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13 UNITED STATES DISTRICT COURT
14 DISTRICT OF NEVADA
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16 SHIGE TAKIGUCHI, FUMI NONAKA,) 2:13-cv-01183-HDM-VCF
17 MITSUAKI TAKITA, TATSURO SAKAI,)
18 SHIZUKO ISHIMORI, YUKO NAKAMURA,)
19 MASAAKI MORIYA, HATSUNE HATANO,) ORDER GRANTING CLASS
20 and HIDENAO TAKAMA, Individually) CERTIFICATION
21 and on Behalf of All Others)
22 Similarly Situated,)

23 Plaintiffs,)

24 vs.)

25 MRI INTERNATIONAL, INC., EDWIN J)
26 FUJINAGA, JUNZO SUZUKI, PAUL)
27 MUSASHI SUZUKI, LVT, INC., dba)
28 STERLING ESCROW, and DOES 1-500,)

Defendants.)

Before the court is the plaintiffs' motion for class certification (#255). Defendants have opposed (#336, #337 & #338), and plaintiffs have replied (#347).

1 Plaintiffs are nine Japanese investors who bring this suit on
2 behalf of a putative class of 8,700 individuals who invested with
3 defendant MRI International, Inc. ("MRI") between July 5, 2008, and
4 May 1, 2013. MRI is a Nevada corporation headquartered in Las
5 Vegas with a branch in Tokyo, Japan. Since 1998, MRI purported to
6 run a business that dealt in the purchase and collection of
7 "Medical Accounts Receivable" ("MARS"). To obtain money, MRI
8 solicited investments - primarily from individuals in Japan - by
9 promising a safe and secure return on investments. MRI's U.S.
10 operations were run by its president, CEO and sole shareholder,
11 defendant Edwin Fujinaga ("Fujinaga"), and the Tokyo operations -
12 from which marketing and solicitation of investments were
13 controlled - were run by defendant Junzo Suzuki. Defendant Paul
14 Musashi Suzuki was also involved in the marketing and sales of MRI
15 securities and responsible for many of the oral and written
16 misrepresentations given to investors. Defendant LVT, Inc.
17 ("Sterling Escrow") received and distributed the investors' funds
18 and effectively operated as MRI's bookkeeper. Plaintiffs assert
19 that MRI, Fujinaga, and the Suzukis specifically and repeatedly
20 assured MRI's prospective and existing investors that MRI's
21 business was legitimate and that investors' monies would be secure.
22 But instead, they allege, MRI operated as a massive Ponzi scheme,
23 and its collapse in 2013 has led to MRI's now inability to repay
24 its investors.

25 MRI solicited investments by placing ads in Japanese
26 newspapers and magazines and sending mass e-mails to Japanese
27 citizens. It also hosted a web site. Interested individuals could
28 contact the Tokyo office for more information, and MRI in return

1 would send a set of "welcome materials" that included its
2 pamphlet/offering materials and an investment application. These
3 materials were, in all relevant years, substantially identical. In
4 addition to describing the various options investors had, the
5 offering materials stated that:

- 6 1. Investors' money would be invested only in MARS;
- 7 2. Investors' money would be managed not by MRI but by an
8 independent escrow company obligated by U.S. law to
9 deposit a set percentage of funds with the state
10 government each month, which would be used to indemnify
11 the investors in the event of a default;
- 12 3. Investors' money would be placed in a "lockbox" account,
13 which only the largest and safest banks could establish,
14 and which only the most trustworthy of customers could
15 obtain;
- 16 4. Funds in the lockbox would be used solely to buy MARS
17 that were of greater value than the amount MRI paid for
18 them;
- 19 5. The lockbox would be independently managed and, if the
20 bank were to fail, the state government would guarantee
21 the funds in the account, with the investors having the
22 first right of priority to recover the funds;
- 23 6. Each U.S. state guaranteed MARS up to a legal limit, and
24 MRI purchased MARS only up to the guaranteed limit; and
- 25 7. If MRI filed for bankruptcy, then the escrow company,
26 with the assistance of the state government, would retain
27 a new company to collect on the MARS. The escrow company
28 would then be responsible for distributing the funds to

1 the investors.
2 Plaintiffs allege that every MRI investor received a packet
3 containing the above information. Those who decided to invest with
4 MRI filled out the application and mailed it back to MRI's Las
5 Vegas headquarters. Once MRI received an application, it would
6 send the applicant a "Pre-Agreement Disclosure Document" ("PADD")
7 and a "Corporate Certificate of Investment Agreement." The PADD
8 represented that:

- 9 1. The purpose of the investment was solely to invest in the
10 collection of MARS; and
- 11 2. MARS purchased in accordance with the contract would be
12 separately maintained from MRI's assets and would be
13 managed by a third-party escrow company that had received
14 authorization from the Nevada state government.

15 To complete the investment, the investor signed and returned the
16 agreement and transferred payment to a Las Vegas Wells Fargo bank
17 account in the name of Sterling Escrow Trustee. Once the funds
18 were received, MRI would mail each investor a "Certificate of
19 Investment" and a "Financial Products Trading Contract."

20 In addition to its advertisements and written offering
21 materials, MRI frequently conducted seminars, informational
22 meetings, and study sessions, as well as tours of the Las Vegas
23 headquarters. Most of the presentations were given by either or
24 both Junzo and Paul Musashi Suzuki. The Suzukis reiterated the
25 specific representations set forth in the written materials, all
26 essentially touting the benefits and safety of investing in MRI.
27 MRI also issued monthly newsletters and a magazine called VIMO.
28 VIMO was published by Paul Musashi Suzuki, and in it he authored

1 articles about MRI's investment scheme and the safety of the
2 investment.

3 The gravamen of plaintiffs' complaint is that none of the
4 representations defendants made about the safety of investing in
5 MRI were true, and that instead of using investors' money to
6 purchase MARS, defendants used the money to pay off earlier
7 investors, fund their lavish lifestyles, and finance other
8 undisclosed ventures.

9 In 2013, the Financial Services Agency of Japan (Kanto Local
10 Finance Bureau) ("FSA") conducted an investigation of MRI. On
11 April 26, 2013, it issued findings that MRI had engaged in
12 fraudulent marketing practices and improperly handled investors'
13 funds. It found that MRI had not followed the promises it had made
14 to investors about how their money would be handled, commingled
15 company assets with investor funds, and used investor funds to pay
16 dividends and redemptions to other investors rather than acquire
17 equities. As a result of the investigation, MRI's license to
18 conduct business in Japan was revoked.

19 The findings by the FSA precipitated the collapse of the MRI
20 scheme. Since that time, multiple lawsuits have been filed in
21 connection with MRI's collapse. In addition to this putative class
22 action, several individual lawsuits were filed in Japan, the U.S.
23 Securities and Exchange Commission ("SEC") filed suit against MRI
24 and Fujinaga in this district, and a criminal indictment has been
25 returned against Fujinaga, Junzo Suzuki and Paul Musashi Suzuki,
26 also in this district. Plaintiffs now seek class certification.

1 Analysis

2 A class action is “an exception to the usual rule that
3 litigation is conducted by and on behalf of the individual named
4 parties only.” *Wal-Mart Stores, Inc. v. Dukes*, 564 U.S. 338, 131
5 S. Ct. 2541, 2550 (2011) (quoting *Califano v. Yamasaki*, 442 U.S.
6 682, 700-01 (1979)). To “justify a departure from that rule, a
7 class representative must be part of the class and possess the same
8 interest and suffer the same injury as the class members.” *Id.*
9 (internal quotation marks omitted).

10 To obtain certification, plaintiffs must first show that:

- 11 (1) the class is so numerous that joinder of all members is
12 impracticable;
- 13 (2) there are questions of law or fact common to the class;
- 14 (3) the claims or defenses of the representative parties are
15 typical of the claims or defenses of the class; and
- 16 (4) the representative parties will fairly and adequately
17 protect the interests of the class.

18 Fed. R. Civ. P. 23(a). Plaintiffs must also satisfy one of three
19 subsections of Rule 23(b). Here, plaintiffs rely on Rule 23(b) (3),
20 which allows a class action to be maintained where “the court finds
21 that the questions of law or fact common to class members
22 predominate over any questions affecting only individual members,
23 and that a class action is superior to other available methods for
24 fairly and efficiently adjudicating the controversy.”

25 Plaintiffs, as the parties seeking class certification, bear
26 the burden of affirmatively showing that they meet the requirements
27 of Rule 23. *Wal-Mart*, 131 S. Ct. at 2551. A class action may be
28 certified only if the court is satisfied after a “rigorous

analysis" that the requirements of Rule 23(a) have been met. *Gen. Tel. Co. of Sw. v. Falcon*, 457 U.S. 147, 161 (1982). This may sometimes require the court to "probe behind the pleadings" into the merits of the plaintiffs' case. *Wal-Mart*, at 2551-52. But as a general rule, the court may not "engage in free-ranging merits inquiries at the certification stage." *Amgen Inc. v. Conn. Ret. Plans & Trust Funds*, - U.S. -, 133 S. Ct. 1184, 1194-95 (2013). "Merits questions may be considered to the extent - but only to the extent - that they are relevant to determining whether the Rule 23 prerequisites for class certification are satisfied." *Id.* at 1195.

I. Rule 23(a)

A. Numerosity

This element is satisfied if "the class is so numerous that joinder of all members is impracticable." Fed. R. Civ. P. 23(a)(1). Plaintiffs have filed suit on behalf of a class that could number between 4,000 and 8,000 members. Defendants do not contest that this number would make joinder impracticable. Plaintiffs have therefore satisfied the numerosity requirement.

B. Commonality

Commonality requires there to be questions of law or fact common to the class. Fed. R. Civ. P. 23(a)(2). To satisfy this requirement, class members must have suffered the same injury; their claims must rely on a common contention, and that contention "must be of such a nature that it is capable of classwide resolution - which means that determination of its truth or falsity will resolve an issue that is central to the validity of each one of the claims in one stroke." *Wal-Mart*, 131 S. Ct. at 2551. The Ninth Circuit construes the commonality requirement permissively.

1 "All questions of fact and law need not be common to satisfy the
2 rule. The existence of shared legal issues with divergent factual
3 predicates is sufficient, as is a common core of salient facts
4 coupled with disparate legal remedies within the class." *Hanlon v.*
5 *Chrysler Corp.*, 150 F.3d 1011, 1019 (9th Cir. 1998); *see also*
6 *Blackie v. Barrack*, 524 F.2d 891, 904 n.19 (9th Cir. 1975) ("We
7 think it is for the predominance and other requirements of Rule
8 23(b)(3), rather than the common question requirement, to function
9 to keep the balance between the economies attained and lost by
10 allowing a class action. The common question requirement should
11 not be restrictively interpreted to attain that objective,
12 particularly as to do so would eliminate the class action deterrent
13 for those who engage in complicated and imaginative rather than
14 straightforward schemes to inflate stock prices.").

15 Here, each class member suffered the same injury - actual or
16 expected loss of his or her investment - through the same conduct -
17 MRI's alleged Ponzi scheme. Several questions of law and fact are
18 common to all class members, including but not limited to: (1)
19 whether some or all of the representations made by the defendants
20 about the safety of MRI's investments were false; (2) whether the
21 defendants knew that those statements were false or recklessly
22 disregarded their truth or falsity; (3) whether the representations
23 caused plaintiffs to invest with MRI; (4) whether MRI operated as a
24 Ponzi scheme; and (5) whether the individual defendants were
25 control persons of MRI at the time of the misrepresentations and/or
26 sales of MRI securities, or whether they aided and abetted MRI's
27 fraud. These are, in fact, the major questions of law and fact at
28 issue in this case.

1 The same evidence will be used to prove the existence of a
2 Ponzi scheme, the falsity of the representations, each defendant's
3 role and knowledge in the scheme, and the failure of MRI to repay
4 its investors. A closer question - and that raised by the
5 defendants - is whether the class members' reliance on the
6 representations, which is an element of the securities and state
7 law fraud claims, can be proven on a classwide basis.

8 In *Blackie v. Barrack*, the Ninth Circuit found the commonality
9 requirement met in a securities fraud case where the defendants,
10 through a common course of conduct, defrauded a class of purchasers
11 over a period of time with similar misrepresentations. Applying
12 *Blackie*, district courts in this circuit have found that individual
13 questions of reliance do not preclude a finding of commonality
14 where the plaintiffs allege a common course of conduct directed
15 against all investors. See *McPhail v. First Command Fin. Planning,*
16 *Inc.*, 247 F.R.D. 598, 608 (S.D. Cal. 2007); *In re Badger Mountain*
17 *Irrigation Dist. Sec. Litig.*, 143 F.R.D. 693, 697 (W.D. Wash.
18 1992). *In re Badger Mountain* concerned litigation over investments
19 that had been marketed by some of the defendants as safe and
20 secure. Noting that the defendants had failed to demonstrate that
21 there were material variations in the representations given to
22 potential class members, the court found that because plaintiffs
23 were defrauded by the defendants' common course of conduct, common
24 questions predominated over individual issues. *In re Badger*
25 *Mountain*, 143 F.R.D. at 697. *McPhail* involved a homogenized
26 presentation that contained misleading statements and omissions.
27 *McPhail*, 247 F.R.D. at 602. In holding that the commonality
28 requirement was met, the *McPhail* court noted that "the Ninth

1 Circuit's case law does not require identical misrepresentations to
2 satisfy the commonality requirement." *Id.* at 609-10.

3 The Suzukis' attempts to distinguish the cases relied on by
4 plaintiffs is unavailing, as is their reliance on cases from
5 outside this circuit. Those cases are not only not controlling,
6 they are - to the extent they conflict with the cases cited above -
7 not persuasive. The Ninth Circuit has quite clearly held that
8 individual issues of reliance are no bar to finding commonality
9 where the plaintiffs have been deceived by the defendants' common
10 course of conduct. Here, the same core representations about the
11 safety of MRI's business model and investor funds were made in
12 written materials distributed to every investor - most notably the
13 offering pamphlet and the PADD - before they invested. In all of
14 these documents defendants repeated some or all of the core
15 representations: that investor money was used only to invest in
16 MARS, that investor money was safeguarded by an independent escrow
17 company and state law, and that MRI was a legitimate business.
18 These alleged misrepresentations were reinforced orally and in
19 writing through other means to new and existing investors. The
20 sales pitch was thus virtually identical from investor to investor.
21 The Ninth Circuit liberally construes the commonality requirement
22 to enable class certification of fraud claims stemming from a
23 common course of conduct. Plaintiffs have amply alleged a common
24 course of conduct that defrauded them and resulted in a loss and
25 therefore the commonality requirement is met.

26 The Suzukis, however, argue that they made oral
27 representations to only some of the class members and that those
28 representations differed. Thus, they argue, the plaintiffs cannot

1 prove their reliance on the Suzukis' statements on a classwide
2 basis. Plaintiffs respond that they are not relying solely on the
3 Suzukis' oral representations; the Suzukis' oral representations
4 simply reinforced the misrepresentations made in the written
5 materials, which were received by each and every investor.
6 Further, plaintiffs allege that the Suzukis were personally
7 involved in preparing the PADD.

8 At a minimum, the Suzukis' alleged role in drafting the PADD,
9 which was received by each investor before his or her investment,
10 creates a common question of reliance as to the Suzukis. Moreover,
11 and more importantly, the Suzukis are allegedly two of only three
12 to four people behind MRI's alleged fraud. Given the close-knit
13 nature of the fraud, plaintiffs' claim that the Suzukis are liable
14 for a § 10(b) violation as control persons means MRI's entire
15 common course of conduct would be attributable to the Suzukis,
16 whether they directly made the misrepresentations or not. The
17 court concludes that plaintiffs have alleged a common course of
18 conduct perpetrated by MRI and its principals sufficient to satisfy
19 the commonality requirement.

20 C. Typicality

21 Typicality requires that the claims or defenses of the
22 representative parties are typical of the claims or defenses of the
23 class. Fed. R. Civ. P. 23(a)(3). "The purpose of the typicality
24 requirement is to assure that the interest of the named
25 representative aligns with the interests of the class." *Wolin v.*
26 *Jaguar Land Rover N. Am., LLC*, 617 F.3d 1168, 1175 (9th Cir. 2010)
27 (quoting *Hanon v. Dataproducts Corp.*, 976 F.2d 497, 508 (9th Cir.
28 1992)). Typicality is satisfied where the lead plaintiff has the

1 same or similar injury as the class members; where the action is
2 based on conduct which is not unique to the named plaintiff; and
3 where other class members have been injured by the same course of
4 conduct as the named plaintiff. *Id.*

5 Defendants do not contest that plaintiffs have met this
6 requirement. The named plaintiffs in this case lost or will lose
7 the money they invested in MRI due to the defendants' alleged
8 operation of a Ponzi scheme and repeated misrepresentations. This
9 is the same injury based on the same conduct that all class members
10 have suffered. Accordingly, the court finds the typicality
11 requirement is met.

12 D. Adequacy

13 To meet this requirement, the class representative must fairly
14 and adequately protect the interests of the class. Fed. R. Civ. P.
15 23(a)(4). "The adequacy inquiry . . . serves to uncover conflicts
16 of interest between named parties and the class they seek to
17 represent." *Amchem Prods., Inc. v. Windsor*, 521 U.S. 591, 625
18 (1997). Adequacy requires considering the competency and any
19 conflicts of interest of class counsel, as well as whether the
20 named plaintiffs and class counsel will vigorously prosecute the
21 action on behalf of the class. *Id.* at 626 n.20; *In re Mego Fin.*
22 *Corp. Sec. Litig.*, 213 F.3d 454, 462 (9th Cir. 2000).

23 Plaintiffs argue that lead plaintiff Yuko Nakamura is adequate
24 because her claim is typical of the class, she has no interests
25 antagonistic to the class, and she has a substantial financial
26 interest which will ensure her vigorous advocacy. Nakamura
27 understands the responsibilities of being lead plaintiff,
28 understands the issues presented in this case, and is willing to

1 assist in the prosecution of this case through trial. Plaintiffs
2 further argue that counsel have no conflicts with the class, have
3 thus far vigorously represented the class, and have extensive
4 experience with class actions and complex commercial litigation.

5 The Suzukis argue that the named plaintiffs and class counsel
6 cannot adequately represent the class. First, they assert that
7 plaintiffs lack an attorney-client relationship with class counsel
8 and that this litigation is not actually being directed by class
9 counsel but instead is being directed by a group of Japanese
10 attorneys who have joined together to represent victims of MRI's
11 fraud. About 4,000 out of MRI's 8,700 potential victims have
12 signed up with the victim's group created by the Japanese
13 attorneys. The attorneys have already filed a handful of actions
14 in Japan against MRI and the Suzukis and, the Suzukis argue, the
15 recovery in those actions will go to compensate all victims who
16 have signed up with the group. The Suzukis argue that the real
17 attorneys behind this case - the Japanese attorneys - have a
18 conflict of interest in representing this class because if they
19 prevail in Japan they may be less motivated to devote resources to
20 prosecuting this class action, which is being pursued on behalf of
21 a substantial number of MRI victims who have *not* signed up with the
22 Japanese victims' group.

23 The court is not persuaded that any conflict of interest
24 exists. There is no evidence that Japanese, rather than class,
25 counsel are actually behind this litigation, or that plaintiffs
26 lack a client relationship with class counsel. However, even if
27 Japanese counsel are involved in this action, the argument that
28 they would be unmotivated to pursue this action were they to

1 prevail in Japan is, as plaintiffs argue, also unpersuasive. Not
2 only do the defendants have substantial assets in the United
3 States, which would be easier to collect with a U.S. judgment, but
4 as the Suzukis' argument implicitly concedes, the putative class
5 for which this action is being pursued includes both members and
6 non-members of the Japanese MRI Victim's Group. There is no reason
7 to conclude that Japanese counsel would abandon a case that would
8 benefit members of their group as well as non-members. The cases
9 cited by the Suzukis are distinguishable.

10 The Suzukis also argue that the named class representatives
11 cannot adequately represent the class due to credibility issues.¹
12 The court is not persuaded that any omissions in the plaintiffs'
13 declarations or any inconsistencies between the declarations and
14 the depositions are evidence of a lack of credibility. Further,
15 the cases the Suzukis have cited in this regard are readily
16 distinguishable.

17 The named plaintiffs have suffered the same injury as the
18 class members and no evident conflict exists between their
19 interests and the interests of the class. Named plaintiffs and
20 class counsel have vigorously prosecuted this action since its
21 inception, and class counsel are qualified and competent to do so.
22 Accordingly, the court concludes the adequacy requirement is met.

23 II. Rule 23(b)

24 In addition to meeting the requirements of Rule 23(a),
25 plaintiffs must also satisfy one of the three subsections of Rule

26
27 ¹ The Suzukis also focus on the failure of 16 of the 25 named
28 plaintiffs to attend or agree on dates to attend depositions in the United
States. This argument appears to be mooted by the recent reduction in the
number of named plaintiffs from 25 to 9. (See Doc. #351 at 2).

1 23(b) before the court may certify this as a class action.

2 Plaintiffs here rely on Rule 23(b) (3) .

3 A. Predominance

4 The first requirement under Rule 23(b) (3) is that questions of
5 law or fact common to the class members predominate over individual
6 questions. "[T]he common questions must be a significant aspect of
7 the case that can be resolved for all members of the class in a
8 single adjudication." *Berger v. Home Depot USA, Inc.*, 741 F.3d
9 1061, 1068 (9th Cir. 2014) (internal punctuation omitted).

10 Determining whether common issues predominate begins with the
11 elements of the underlying causes of action. *Erica P. John Fund,*
12 *Inc. v. Halliburton Co.*, 563 U.S. - , 131 S. Ct. 2179, 2184(2011).
13 Here, plaintiffs have asserted twelve causes of action: (1) Section
14 10(b) of the Securities Exchange Act of 1934 and Rule 10b-5; (2)
15 Section 12(a) of the Securities Act of 1933; (3) Section 20(a) of
16 the Securities Exchange Act of 1934; (4) Section 15 of the
17 Securities Act of 1933; (5) intentional fraud; (6) unjust
18 enrichment; (7) breach of fiduciary duty; (8) aiding and abetting
19 fraud; (9) breach of contract; (10) action for accounting; (11)
20 constructive trust; and (12) fraudulent transfer.

21 I. Section 10(b) and Rule 10B-5

22 Section 10(b) prohibits the use or employment "in connection
23 with the purchase or sale of any security" of "any manipulative or
24 deceptive device or contrivance in contravention of such rules and
25 regulations as the Commission may prescribe as necessary or
26 appropriate in the public interest or for the protection of
27 investors." 15 U.S.C. § 78j. Rule 10B-5 makes it

28 unlawful for any person, directly or indirectly, by the

1 use of any means or instrumentality of interstate
2 commerce, or of the mails or of any facility of any
3 national securities exchange, (a) To employ any device,
4 scheme, or artifice to defraud, (b) To make any untrue
5 statement of a material fact or to omit to state a
6 material fact necessary in order to make the statements
made, in the light of the circumstances under which they
were made, not misleading, or (c) To engage in any act,
practice, or course of business which operates or would
operate as a fraud or deceit upon any person, in
connection with the purchase or sale of any security.

7 17 C.F.R. § 240.10b-5. Thus, the elements of a § 10(b) and Rule
8 10B-5 claim are: (1) defendants' material misrepresentations or
9 omissions; (2) scienter; (3) connection between the
10 misrepresentation or omission and the purchase or sale of a
11 security; (4) reliance upon the misrepresentation or omission; (5)
12 economic loss; and (6) loss causation. *Erica P. John Fund*, 131 S.
13 Ct. at 2184.

14 As discussed above in connection with commonality, most of
15 these elements are clearly susceptible to classwide proof,
16 particularly the alleged misrepresentations made by the defendants,
17 scienter, and loss. The Suzukis argue, however, that two elements
18 are not susceptible to classwide proof: plaintiffs' reliance and
19 the materiality of the representations.

20 a. Reliance

21 Predominance involves many of the same considerations as
22 commonality, but it is a more stringent requirement. *Westways*
23 *World Travel, Inc. v. AMR Corp.*, 218 F.R.D. 223, 236 (C.D. Cal.
24 2003). Even under the higher predominance standard, however, the
25 court concludes that individual issues of reliance do not compel a
26 finding that individual questions predominate over common
27 questions.

28 The "Ninth Circuit decisions favor a liberal use of class

1 actions to enforce federal securities laws." *McPhail v. First*
2 *Command Fin. Planning, Inc.*, 247 F.R.D. 598 (S.D. Cal. 2007)
3 (internal quotation marks omitted). In addition, the Ninth Circuit
4 has found class certification to be appropriate where the defendant
5 used a "standardized sales pitch." *In re First Alliance Mortg.*
6 *Co.*, 471 F.3d 977, 990 (9th Cir. 2006). In *First Alliance*, the
7 defendant "trained its loan officers to follow a manual and script
8 known as the 'Track,' which was to be memorized verbatim by sales
9 personnel and executed as taught." *Id.* at 985. Importantly, the
10 court noted that while other courts have adopted somewhat differing
11 standards as to "the degree of factual commonality required in the
12 misrepresentations to class members in order to hold a defendant
13 liable for classwide fraud," the Ninth Circuit "has followed an
14 approach that favors class treatment of fraud claims stemming from
15 a 'common course of conduct.'" *In re First Alliance*, 471 F.3d at
16 990.

17 The *First Alliance* court cited and discussed with approval a
18 district court case, *In re American Continental Corp./Lincoln*
19 *Savings & Loan Securities Litigation*, 140 F.R.D. 425 (D. Ariz.
20 1992). *Lincoln Savings* involved a "multifarious scheme to defraud"
21 that included sales presentations to the plaintiffs. *Id.* at 427-
22 28, 430-31. The defendants argued that the sales presentations
23 were not uniform, and thus individual issues of reliance precluded
24 class certification. *Id.* at 430. The court noted that class
25 actions are appropriate where a "standardized sales pitch" is
26 employed, because sales presentations "uniformly patterned on a
27 known model provides certitude that material misrepresentations
28 were a causative factor in each plaintiffs' decision and "[t]hus, a

1 class action may be maintained where plaintiffs can establish that
2 the sales agents' representations did not vary in material
3 respects." *Id.* The court held that while the representations were
4 not identical, they were "sufficiently uniform to warrant class
5 treatment." *Id.*

6 As discussed above, *McPhail v. First Command Fin. Planning*
7 involved a homogenized presentation given by sales agents which
8 contained misleading statements and omissions. The defendants in
9 *McPhail* objected to class certification primarily on the grounds
10 that individual issues of reliance predominated over common
11 questions. In considering the predominance question, the court
12 discussed the holdings of *First Alliance* and *Lincoln Savings* and
13 noted that, "[i]n effect, the *Lincoln Savings* court used the
14 uniformity of the misrepresentations to presume the plaintiffs
15 relied on those misrepresentations in their investment decisions."
16 *Id.* It concluded that, on the basis of *First Alliance* and *Lincoln*
17 *Savings*, "within the Ninth Circuit, plaintiffs can establish a
18 presumption of reliance by means of sufficiently uniform oral
19 misrepresentations in a marketing script." *McPhail*, 247 F.R.D. at
20 614. The court noted, importantly, that "the reliance requirement
21 must encompass the rise of sophisticated marketing strategies which
22 rely on communicating similar misrepresentations to a large class
23 of investors." *Id.* at 614-15.

24 Here, plaintiffs allege that defendants made to all investors
25 substantially similar, if not identical, misrepresentations as to
26 the safety of investing with MRI. The court finds the alleged
27 misrepresentations sufficiently uniform to raise a presumption of
28

1 reliance under *McPhail*, *First Alliance*, and *Lincoln Savings*.²

2 b. Materiality

3 The Suzukis argue that *materiality* is not susceptible to
4 classwide proof. They assert that materiality will exist only as
5 to plaintiffs investing at the same time. The Suzukis base their
6 argument on two cases that held that whether a misrepresentation is
7 material depends on the "total mix" of information available to an
8 investor.³ *J.H. Cohn Co. v. Am. Appraisal Assocs., Inc.*, 628 F.2d
9 994 (7th Cir. 1980); *Gelman v. Westinghouse Elec.*, 73 F.R.D. 60
10 (W.D. Penn. 1976).

11 Both *J.H. Cohn* and *Gelman*, however, involved evolving
12 situations where the information known to the investing class was
13 constantly changing. See *J.H. Cohn*, 628 F.2d at 998 & n.3 ("We
14 feel the district court did not abuse its discretion in concluding
15 that the changing factual situation over a thirty-three month
16 period undercuts the predominance of any common course of
17 conduct."); *Gelman*, 73 F.R.D. at 67 ("In this case, however,
18 plaintiffs' claims are based not on a single or substantially

19 _____
20 ² The Suzukis' attempts to distinguish the relevant case law is
21 unavailing as are their other arguments. The Suzukis argue that many of the
22 plaintiffs made their initial investments outside of the class period, so
23 it is impossible for them to have relied on any misrepresentation during the
24 class period. This argument is without merit. Clearly, any decisions to
25 reinvest in MRI would have been influenced by the continuing
26 misrepresentations about the safety of investing in MRI, which were made
27 repeatedly to all investors. The Suzukis also argue that different
28 subgroups of investors received differing oral disclosures over the class
period and that some of the class members never met the Suzukis and never
received any representations from them directly. As discussed above, this
argument is irrelevant in this case, where the Suzukis at a minimum were
involved in written materials distributed to all investors before they
invested and where the Suzukis have been sued as control persons.

3 The Suzukis also cite and rely on *TSC Industries, Inc. v. Northway, Inc.*, 426 U.S. 438 (1976), but that case merely provides the definition of materiality. *TSC Indus.*, 426 U.S. 444.

1 constant misdeed, but rather on a changing, fluctuating series of
2 alleged events"). Here, the plaintiffs have alleged that
3 throughout the entire class period, the defendants repeatedly made
4 the same core misrepresentations. Nothing is alleged to have
5 changed through the class period. In fact, the Suzukis' argument
6 that as to some of the investors, the Suzukis' oral representations
7 did not alter the "total mix" of what they already knew (see Opp'n
8 14) actually supports plaintiffs' position - that the total mix of
9 information more or less remained consistent throughout the class
10 period.

11 The Suzukis argue that statements they made to individuals who
12 had already invested are less material than statements they made to
13 individuals who were considering investing, and thus materiality
14 will differ from one class member to another. The Suzukis
15 participated in a common course of conduct in which the same core
16 misrepresentations were constantly repeated. As noted above, any
17 decisions to reinvest in MRI would have been influenced by the
18 continuing misrepresentations about the safety of investing in MRI
19 which reinforced what the existing investor already believed about
20 MRI. The court does not see any meaningful difference between the
21 statements made to individuals who had not yet invested and the
22 statements made to existing investors.

23 ii. Section 12(a)

24 Section 12(a)(1) imposes liability for the offer or sale of an
25 unregistered security. 15 U.S.C. § 771(a)(1). Section 12(a)(2)
26 imposes liability for the offer or sale of securities by means of a
27 prospectus or oral communication that "includes an untrue statement
28 of material fact or omits to state a material fact necessary in

1 order to make the statements, in the light of the circumstances
2 under which they were made, not misleading." 15 U.S.C. §
3 771(a)(2).

4 Defendants do not argue that individual issues predominate as
5 to this claim, nor does the court believe any element would entail
6 an analysis of individual issues. Whether the defendants offered
7 or sold unregistered MRI securities and whether the defendants made
8 misleading or false statements in connection with the sale or offer
9 to sell MRI securities can be proven on a classwide basis.

10 Accordingly, the predominance requirement is met with respect to
11 this claim.

12 iii. Sections 15 and 20(a)

13 Sections 15 and 20(a) impose liability on control persons for
14 a primary violation of the securities laws - in this case, §§ 12(a)
15 and 10(b). Control is defined as "the possession, direct or
16 indirect, of the power to direct or cause the direction of the
17 management and policies of a person, whether through the ownership
18 of voting securities, by contract, or otherwise." 17 C.F.R. §
19 230.405. "To establish 'controlling person' liability, the
20 plaintiff must show that a primary violation was committed and that
21 the defendant 'directly or indirectly' controlled the violator."
22 *Paracor Fin., Inc. v. Gen. Elec. Capital Corp.*, 96 F.3d 1151, 1161
23 (9th Cir. 1996). "[W]hether a person is a 'controlling person is
24 an intensely factual question, involving scrutiny of the
25 defendant's participation in the day-to-day affairs of the
26 corporation and the defendant's power to control corporate
27 actions." *Id.* at 1162.

28 Defendants do not argue that individual issues predominate as

1 to this claim, nor does the court believe any element would entail
2 an analysis of individual issues. Whether Fujinaga or the Suzukis
3 were controlling persons will depend on proof that is specific to
4 Fujinaga and the Suzukis, which is proof common to the entire
5 class. Accordingly, the predominance requirement is met with
6 respect to this claim.

7 iv. Fraud

8 The elements of a fraud claim under Nevada law are: (1) a
9 false representation made by the defendant; (2) the defendant's
10 knowledge or belief that the representation was false (or an
11 insufficient basis for making the representation); (3) the
12 defendant's intention to induce the plaintiff to act or to refrain
13 from acting in reliance upon the misrepresentation; (4) the
14 plaintiff's justifiable reliance upon the misrepresentation; and
15 (5) damage to the plaintiff resulting from such reliance. *Bulbman,*
16 *Inc. v. Nev. Bell*, 825 P.2d 588, 592 (Nev. 1992).

17 For purposes of certification, the relevant elements of the
18 state law fraud claim are substantially the same as those of the
19 securities fraud claim. Therefore, for the same reasons that
20 predominance is satisfied with respect to the securities fraud
21 claim, it is also satisfied with respect to the state law fraud
22 claim.

23 v. Unjust Enrichment

24 Unjust enrichment is "the result or effect of a failure to
25 make restitution of, or for, property or benefits received under
26 such circumstances as to give rise to a legal or equitable
27 obligation to account therefor." *Leasepartners Corp. v. Robert L.*
28 *Brooks Trust Dated Nov. 12, 1975*, 942 P.2d 182, 187 (Nev. 1997).

1 The elements are:

- 2 (1) a benefit conferred on the defendant by the
- 3 plaintiff;
- 4 (2) appreciation by the defendant of such benefit; and
- 5 (3) an acceptance and retention by the defendant of such
- 6 benefit under circumstances such that it would be
- 7 inequitable for him to retain the benefit without
- 8 payment of the value thereof.

9 *Unionamerica Mortg. & Equity Trust v. McDonald*, 626 P.2d 1272, 1273
10 (Nev. 1981). "Unjust enrichment occurs whenever a person has and
11 retains a benefit which in equity and good conscience belongs to
12 another." *Id.*

13 The Suzukis argue that choice-of-law issues prevent
14 certification of this claim. The Suzukis cite district court cases
15 finding that because the law of unjust enrichment varies from state
16 to state, certification of a nationwide class on unjust enrichment
17 poses insurmountable choice of law problems. However, in this
18 case, where nearly all the plaintiffs are Japanese citizens and all
19 alleged misrepresentations occurred in either Japan or Nevada,
20 either Nevada or Japanese law will govern. The Suzukis have not
21 argued that several types of unjust enrichment standards exist
22 throughout Japan, nor even that Japanese law recognizes such a
23 claim. The choice between Nevada law, which recognizes this claim,
24 and Japanese law, which may or may not, does not defeat class
25 certification of this claim.

26 Whether the defendants received and retained money from
27 plaintiffs that they have no just right to retain by operating a
28 Ponzi scheme is a question that can be answered classwide; no

1 individual issues preclude certification of this claim.

2 vi. Breach of Fiduciary Duty

3 "A breach of fiduciary duty claim seeks damages for injuries
4 that result from the tortious conduct of one who owes a duty to
5 another by virtue of the fiduciary relationship." *Stalk v.*
6 *Mushkin*, 199 P.3d 838, 843 (Nev. 2009). A "fiduciary relation
7 exists between two persons when one of them is under a duty to act
8 for or to give advice for the benefit of another upon matters
9 within the scope of the relation." *Id.* To prevail on a breach of
10 fiduciary duty claim, the plaintiff must establish: "(1) the
11 existence of a fiduciary duty; (2) breach of that duty; and (3) the
12 breach proximately caused the damages." *Klein v. Freedom Strategic*
13 *Partners, LLC*, 595 F. Supp. 2d 1152, 1162 (D. Nev. 2009).

14 Defendants do not argue that this claim is improper for class
15 certification, nor does the court believe any individual issues
16 would make certification inappropriate.

17 vii. Aiding and Abetting

18 "[L]iability attaches for civil aiding and abetting if the
19 defendant substantially assists or encourages another's conduct in
20 breaching a duty to a third person." *Dow Chem. Co. v. Mahlum*, 970
21 P.2d 98, 112 (Nev. 1998), *overruled on other grounds by GES, Inc.*
22 *v. Corbitt*, 21 P.3d 11, 15 (Nev. 2001). To prove this claim, which
23 is asserted only against Sterling Escrow, plaintiffs must show: (1)
24 that one or more of the defendants made a fraudulent
25 misrepresentation that injured plaintiffs; (2) that Sterling Escrow
26 was aware of its role in promoting the fraudulent misrepresentation
27 at the time it provided assistance; and (3) that Sterling Escrow
28 knowingly and substantially assisted the defendants in committing

1 fraudulent misrepresentation. *Id.*

2 Sterling Escrow argues that reliance as to the fraud claim
3 cannot be proven on a classwide basis, and thus certification as to
4 the aiding and abetting fraud claim would be improper. For the
5 reasons discussed above, common questions predominate over
6 individual questions as to the fraud claim, and therefore Sterling
7 Escrow's argument is without merit. Whether Sterling Escrow was
8 aware of its role in promoting a fraud and knowingly assisted the
9 other defendants in committing the fraud are clearly common
10 questions subject to class certification.

11 viii. Breach of Contract

12 Defendants do not argue that this claim is inappropriate for
13 class certification. Plaintiffs allege that all investors signed
14 the same form contract and MRI either breached or did not breach
15 the contract with respect to all investors. No individual
16 questions appear to exist with respect to this claim, and therefore
17 class certification is appropriate.

18 ix. Accounting

19 "An action for accounting . . . is a proceeding in equity for
20 the purpose of obtaining a judicial settlement of the accounts of
21 the parties in which proceeding the court will adjudicate the
22 amount due, administer full relief and render complete justice."
23 *Oracle USA, Inc. v. Rimini St., Inc.*, 2010 WL 3257933, at *6 (D.
24 Nev. 2010) (internal citations and quotation marks omitted). The
25 District of Nevada "has held that '[a]n action for inspection and
26 accounting will prevail only where the plaintiff can establish that
27 there exists a relationship of special trust between the plaintiff
28 and defendant.'" *Thomas v. Wachovia Mortgage, FSB*, 2011 WL

1 3159169, at *6 (D. Nev. 2011) (internal citations omitted).

2 Whether defendants, by their common course of conduct and
3 alleged repeated misrepresentations, created a relationship of
4 special trust with the plaintiffs is subject to classwide proof.
5 No individual issues exist that would impede certification of this
6 claim.

7 x. Constructive Trust

8 "A constructive trust has been defined as a remedial device by
9 which the holder of legal title to property is held to be a trustee
10 for the benefit of another who in good conscience is entitled to
11 it. The requirement that a constructive trustee have title (not
12 mere possession) to the property involved is critical to the
13 imposition of a constructive trust." *Danning v. Lum's, Inc.*, 478
14 P.2d 166, 167 (Nev. 1970). "[I]mposition of a constructive trust
15 requires: '(1) [that] a confidential relationship exists between
16 the parties; (2) retention of legal title by the holder thereof
17 against another would be inequitable; and (3) the existence of such
18 a trust is essential to the effectuation of justice.'" *Waldman v.*
19 *Maini*, 195 P.3d 850, 857 (Nev. 2008). Constructive trust "is not
20 'limited to [fraud and] misconduct cases; it redresses unjust
21 enrichment, not wrongdoing.'" *Id.*

22 For the same reasons that support class certification of the
23 breach of fiduciary and accounting claims, no individual questions
24 exist to preclude class certification as to the constructive trust
25 claim.

26 xi. Fraudulent Transfer

27 Plaintiffs allege a claim of constructive fraudulent transfer
28 under Nevada Revised Statutes § 112.180(1)(b) against the Suzukis

1 and Sterling Escrow. Such a claim requires showing that MRI made
2 transfers to the Suzukis and Sterling Escrow without "receiving a
3 reasonably equivalent value in exchange for the transfer or
4 obligation" at a time that MRI believed or reasonably should have
5 believed that it would not be able to repay its investors.

6 The defendants do not claim that individual issues predominate
7 as to this claim. Accordingly, this claim is proper for class
8 action.

9 B. Superiority

10 The class action must be superior to other available methods
11 for fairly and efficiently adjudicating the controversy. Fed. R.
12 Civ. P. 23(b)(3). Factors to consider in this respect include:

- 13 (A) the class members' interests in individually controlling
14 the prosecution or defense of separate actions;
- 15 (B) the extent and nature of any litigation concerning the
16 controversy already begun by or against class members;
- 17 (C) the desirability or undesirability of concentrating the
18 litigation of the claims in the particular forum; and
- 19 (D) the likely difficulties in managing a class action.

20 Plaintiffs argue that a class action is superior because the
21 costs of individual litigation would be prohibitively high compared
22 to each individual plaintiff's measure of damages. While the
23 damages run from tens of thousands to hundreds of thousands of
24 dollars, travel to the United States for each plaintiff would be a
25 hardship to their finances and their health. Further, individual
26 litigation of these cases would be a substantial burden on this
27 court. Finally, litigation in this district is desirable because
28 Fujinaga and Sterling Escrow, along with their assets, are here, as

1 are some of the Suzukis' assets.

2 The Suzukis argue that the class action here in the United
3 States is not superior to individual litigation in Japan,
4 especially since - as Japan may not recognize class actions - any
5 judgment in this case may not be entitled to preclusive effect and
6 the Suzukis would therefore face continued exposure in Japan even
7 after expending significant resources to defend this action. They
8 argue that where foreign plaintiffs are involved, the fact that a
9 foreign court may not recognize the judgment will count against a
10 finding of superiority and may, in consideration of other facts,
11 lead to the exclusion of foreign claimants from the class.

12 The enforceability of the class action in Japan is of less
13 significance given that substantial assets of the defendants are
14 located in this district and country. The Suzukis have not
15 identified any other method that would be better suited to resolve
16 this controversy. The only alternative suggested to the court is
17 the filing of individual claims, which would "burden the judiciary
18 [and] prove uneconomic for potential plaintiffs." *Hanlon*, 150 F.3d
19 at 1023. The court is not persuaded that dozens or hundreds or
20 even thousands of individual actions in either Japan or the United
21 States, which would occur if class certification is denied, would
22 be a fairer or more efficient method of resolving this controversy
23 - to the plaintiffs, to the court, or to the Suzukis. The burdens
24 it would place on plaintiffs to individually litigate their claims
25 outweigh any interest in individually controlling the litigation.
26 Further, it is desirable to concentrate litigation in the District
27 of Nevada, where much of the relevant assets of the defendants are
28 located. Although some individual cases are pending against some

1 of the defendants in Japan, Japan does not have a class action
2 mechanism. The fact that other cases are pending in another
3 jurisdiction, and that jurisdiction also contains assets of the
4 defendants apart from the assets located in this district,
5 persuades the court that the existing actions will have little
6 impact on this case. Finally, while class actions can be difficult
7 to manage, that factor alone does not outweigh the benefits of
8 consolidating the claims of thousands of investors into one action
9 that will reduce the caseload on both this court and the courts in
10 Japan. Accordingly, the court concludes that a class action is the
11 superior method for handling this dispute.

12 **Conclusion**

13 In accordance with the foregoing, the plaintiffs' motion for
14 class certification (#255) is hereby **GRANTED. IT IS ORDERED** that
15 the following class is certified.

16 The MRI Investor Class consisting of: all persons who
17 purchased MRI securities during the period July 5, 2008,
18 through May 1, 2013, and were injured as a result of the
19 defendants' conduct. Excluded from the class are the
20 defendants, their employees, their family members and
21 their affiliates, and the following 26 individuals who
22 are plaintiffs in the pending litigation against the
23 defendants in Japan: (1) Tomoyasu Kojima; (2) Keiko
24 Amaya; (3) Masakazu Sekihara; (4) Chiri Satou; (5) Meiko
Murakami; (6) Masayoshi Tsutsumi; (7) Yumiko Ishiguro;
(8) Reiko Suzuki; (9) Hiroji Sumita; (10) Eiko Uchiyama;
(11) Hideyo Uchiyama; (12) Youzou Shiki; (13) Naoki
Nagasawa; (14) Noboru Yokoyama; (15) Masami Segawa; (16)
Fumiko Takagi; (17) Kumiko Kaita; (18) Fumi Kobayashi;
(19) Ikuko Miyazaki; (20) Hina Nagase; (21) Akio Iwama;
(22) Kouji Kishida; (23) Eri Kishida; (24) Nomai Nii;
(25) Youko Miyahara; and (26) Tsukiko Kurano.

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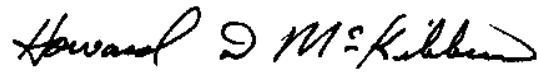
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1 Plaintiffs shall file with the court a proposed form of notice
2 in accordance with Rule 23(c)(2)(B) on or before April 5, 2016.
3 Any objection to the proposed notice should be filed on or before
4 April 15, 2016.

5 **IT IS SO ORDERED.**

6 DATED: This 21st day of March, 2016.

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9 UNITED STATES DISTRICT JUDGE
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